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5 In the Matter of

No. G02-45

6 THE APPLICATION REGARDING
7 THE CONVERSION AND
8 ACQUISITION OF CONTROL OF
9 PREMIERA BLUE CROSS AND ITS
10 AFFILIATES

OIC STAFF’S BRIEF ON PRIVILEGE
ISSUES

11 In compliance with the requirements established in paragraph 2 of the Commissioner’s
12 Tenth Order: Order to Produce Documents for *In Camera* Review, the OIC Staff submits this
13 brief to the Special Master on privilege issues.

14 REGULATORY CONTEXT

15 On September 17, 2002, Premera Blue Cross and its Affiliates (“Premera”) initiated
16 this proceeding by filing a Form A application (“Proposal”) requesting the approval of the
17 Commissioner of Insurance for certain transactions designed to convert Premera from non-
18 profit to for-profit status. The Proposal contemplates a “change in control” under chapters
19 48.31B and 48.31C RCW. The Commissioner is required to consider the Proposal in the
20 context of the criteria established by those chapters including those enumerated in RCW
21 48.31B.015(4)(a) and 48.31C.030(5)(a).

22 Although an adjudicative proceeding is contemplated in making a determination
23 regarding the Proposal, RCW 48.31B.015(4)(b); 48.31C.030(4), the Commissioner, or the
24 OIC Staff as the case may be, is not limited to use of traditional civil discovery tools in
25 obtaining from Premera information relevant to the Proposal. *See* RCW 34.05.446. Chapters
26 48.31B and 48.31C RCW grant, either expressly or by implication, authority independent of
chapter 34.05 RCW for requesting information. RCW 48.31B.015(4); 48.31C.030(4). In fact,

1 Premera has an affirmative duty to furnish complete information concerning the Proposal.
2 RCW 48.31B.015(1), (2); 48.31C.030(1), (2); WAC 284-18-330; 284-18A-330. The
3 Commissioner is vested with the discretion to determine when Premera's filing is complete.
4 RCW 48.31B.015(4); 48.31C.030(4).

5 In addition, by notice dated October 21, 2002 and revised on November 1, 2002, and
6 in conjunction with the review of the Proposal, an examination of Premera was called under
7 RCW 48.31C.070 and all other applicable sections of title 48 RCW and title 284 WAC
8 including RCW 48.31B.035 and chapter 48.03 RCW. To facilitate the review process, the
9 OIC Staff's consultants were designated to serve as examiners. The provisions relating to
10 examinations require that Premera make available to the examiners all relevant information.
11 RCW 48.03.030; 48.31B.035(1); 48.31C.070(1); 48.44.145(2).

12 The information that Premera has withheld based upon claims of attorney-client
13 privilege and/or the work product doctrine was requested by the OIC Staff or its consultants,
14 or both, pursuant to the applicable authority granted in chapters 48.03, 48.31B, 48.31C, and
15 48.44 RCW. The Commissioner, as presiding officer in an adjudicative proceeding, is
16 required to "exclude evidence that is excludable ... on the basis of evidentiary privilege
17 recognized in the courts of this state" without regard to the authority by which it was
18 requested or obtained. RCW 34.05.452(1).

19 DISCUSSION

20 The OIC Staff urges the Special Master to order that all of the information claimed by
21 Premera to be protected as privileged be produced for the reason that Premera has waived
22 privilege with respect to such information. In the alternative, in the event that the Special
23 Master determines that Premera has not waived its privilege claims, the OIC Staff requests
24 that the information be produced for the reason that it is not privileged. With respect to
25 information Premera claims is being withheld as work product, the OIC Staff requests that if it
26 is determined to constitute work product, it should be produced since the OIC Staff has

1 demonstrated a substantial need for the information: the OIC Staff has no other means of
2 obtaining such information and it is central to the issues to be determined in this proceeding.

3 **Implied Waiver of Privilege.**

4 A. Privilege may be waived by implication.

5 Clearly, the attorney-client privilege is subject to waiver. RCW 5.60.060(2)(a) (“An
6 attorney or counselor shall not, **without the consent of his or her client**, be examined as to
7 any communication made by the client to him or her, or his or her advice given thereon in the
8 course of professional employment.”) (Emphasis added.) RCW 5.60.060(2)(a) is merely
9 declaratory of the common law. *State v. Emmanuel*, 42 Wn.2d 799, 815 (1953).

10 Washington recognizes that a party may waive attorney-client privilege where an
11 attorney is sued for malpractice by a client. *Stern v. Daniel*, 47 Wn. 96, 98 (1907) (“[T]he
12 rule of privilege will not be enforced where the client charges mismanagement of his cause by
13 the attorney ... and where it would be manifest injustice to allow the client to take advantage
14 of the rule of privilege to the prejudice of the attorney, or when it would be carried to the
15 extent of depriving the attorney of the means of obtaining or defending his own rights.”) *See*
16 *also*, RPC 1.6(a)(2). The Washington Supreme Court has extended its recognition of implied
17 waiver beyond the typical malpractice action. In *Pappas v. Holloway*, an attorney sued for
18 malpractice joined as third-party defendants all of the other attorneys who represented the
19 clients in the underlying litigation. 114 Wn.2d 198 (1990). The attorney sought disclosure of
20 communications between the clients (plaintiffs) and the third-party defendants relating to that
21 litigation. The Court held that the record supported an implied waiver of the attorney-client
22 privilege as to the attorneys involved in defending the clients. *Id.* at 208. In coming to this
23 conclusion, the Court adopted and applied the test articulated in *Hearn v. Rhay*, 68 F.R.D. 574
24 (E.D. Wash. 1975). *Pappas* at 207-209.

25 In *Hearn*, an inmate of a state penitentiary sued prison officials for civil rights
26 violations. The defendants raised the affirmative defense of qualified immunity based upon

1 advice of counsel. The plaintiff sought disclosure of the relevant communications between
2 the defendants and their attorneys. When the defendants asserted the attorney-client privilege
3 with respect to those communications, the plaintiff argued that by introducing the advice-of-
4 counsel defense, the defendants had waived the privilege regarding any information relevant
5 to that defense. *Hearn* at 580.

6 After review of the pertinent authorities, the court found that in each instance where
7 the privilege was held to be waived,

8 the party asserting the privilege placed information protected by it in issue through
9 some affirmative act for his own benefit, and to allow the privilege to protect against
10 disclosure of such information would have been manifestly unfair to the opposing
11 party.

12 *Id.* at 581. Based upon this, the court used a three-pronged test to determine whether the
13 privilege had been waived:

14 (1) [A]ssertion of the privilege was a result of some affirmative act, such as filing suit,
15 by the asserting party; (2) through this affirmative act, the asserting party put the
16 protected information at issue by making it relevant to the case; and (3) application of
17 the privilege would have denied the opposing party access to information vital to his
18 defense.

19 *Id.* After applying this test, the court determined that the privilege had been waived. *Id.* at
20 583.

21 B. Privilege may be waived by implication in a regulatory proceeding.

22 Although no reported Washington decision is directly in point, the California Supreme
23 Court has considered this question and effectively applied the *Hearn* test in a regulatory
24 proceeding. In *Southern California Gas Company v. Public Utilities Commission*, the
25 commission ordered the company to produce certain attorney-client privileged materials or
26 withdraw its application for recovery of fuel costs. 784 P.2d 1373, 1374, 1379 (Cal. 1990)
(citing *Hearn*). The commission required production of the materials on the basis that the
company had impliedly waived privilege when it put advice of counsel in issue by filing its
application that, if approved, would necessitate a finding that its fuel costs were reasonable in

1 connection with the early termination of a contract. The commission determined that to reach
2 that finding, consideration of legal analyses was necessary “because legal concerns are an
3 essential consideration when determining a reasonable means of terminating a contract.” *Id.*
4 at 1377. In applying the test, the court held that the attorneys’ analyses were neither placed in
5 issue by any action of the company nor vital to a “fair adjudication” of the proceeding because
6 the company had never stated that it intended to rely upon its attorneys’ advice or state of
7 mind to support its contention that the buyout of the contract was reasonable. *Id.* at 1379-
8 1380. Further, the court found that the actual legal analysis was not essential for the
9 determination. *Id.* Thus, the second and third prongs of the test were not satisfied.

10 The situation resulting in the holding in *Southern California Gas Company* is easily
11 distinguished from that presented by this proceeding. First, if the commission determined that
12 the company had not adequately demonstrated that the buyout was reasonable, it could simply
13 disallow recovery of the expense. *Id.* at 1380. The burden of proof under the standard to be
14 applied by the commission was squarely on the company and the company determined what
15 evidence to offer or not in support of its application. If the evidence were not sufficient to
16 sustain that burden, the application would be denied. In this proceeding the burden of proof
17 does not rest squarely upon Premera. Rather, if it elects not to disclose information
18 supporting one of the grounds for disapproval of the Proposal, without more, the
19 Commissioner may be compelled to approve it. RCW 48.31B.015(4)(a); 48.31C.030(5)(a).
20 Thus, the consequences of nondisclosure do not fall upon Premera but instead upon the
21 Commissioner and, therefore, ultimately the public.

22 In addition, as more fully discussed in the letter from Patrick Cantilo to James T.
23 Odiorne dated June 30, 2003, the actual legal analysis considered by Premera is essential for a
24 fair adjudication of this proceeding. The statutory criteria contemplate the necessity of
25 looking beyond the objective manifestations of the Proposal but to the subjective perceptions
26 and motivation of management to fully address such issues as whether the public will benefit

1 from the Proposal, whether Premera's business plan is reasonable and in the public interest
2 and whether the integrity of management in making the choices it has made has not been
3 compromised. *See* RCW 48.31B.015(4)(a); 48.31C.030(5)(a).¹ Further, public policy is
4 paramount in this matter. The regulatory proceeding in *Southern California Gas Company*
5 involved obtaining approval for recovery by the company of the cost of certain fuel
6 expenditures presumably through a rate adjustment. Although that matter certainly affected
7 the public interest, its significance is minimal compared to the impact upon the public that
8 would result if the largest health carrier in this state were permitted in error to take this
9 unprecedented and irreversible step.

10 C. Premera has waived privilege in this proceeding.

11 Application of the *Hearn* test compels the conclusion that Premera's privilege claims
12 have been waived. Clearly, the filing of the Proposal constitutes an affirmative act on the part
13 of Premera for its own benefit that has resulted in assertion of the privilege that fulfills the
14 first element of the test. Further, by initiating this proceeding, Premera has satisfied the
15 second element since it has placed the protected information at issue by making it relevant to
16 the criteria that the Commissioner must consider in determining whether to disapprove the
17 Proposal.² Finally, failing to disclose this information will deny the Commissioner access to
18 information vital to a fair adjudication threatening the integrity of this proceeding.

19 Significantly, the statutory directive requires the Commissioner to approve the Proposal
20 **unless** he finds that one or more factors are satisfied. *See* RCW 48.31B.015(4)(a);
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22 ¹ "The legislature has directed me to consider, among other things, (1) whether the public will benefit
23 from the economies of scale and resources that may occur as a result of the conversion, (2) whether the
24 conversion will increase or prevent significant deterioration in the availability of health care coverage, (3) whether
25 the future business plans of Premera are unfair and unreasonable to subscribers and not in the public interest, and
26 (4) whether the conversion is likely to be hazardous or prejudicial to the insurance-buying public." Fourth Order:
Ruling on Motions to Intervene, page 7 (February 10, 2003).

² The relevancy and importance of the withheld information is discussed at length in the consultants'
letters and memoranda submitted to the Special Master on June 30, 2003 and will not be repeated here. The
letters and memoranda are incorporated herein by reference.

1 48.31C.030(5)(a). Thus, if Premera's claims of privilege are upheld, the record may lack the
2 very information that will support disapproval of the Proposal. This is particularly critical
3 here since the Commissioner is not representing a private interest but is charged with
4 protecting the public interest which makes it more important that his determination be correct
5 and reflect consideration of all relevant information.

6 **Other Privilege Issues.**

7 A. Although the attorney-client privilege is recognized in Washington, the privilege is 8 not absolute.

9 Because enforcement of the privilege may result in exclusion of relevant and material
10 evidence inconsistent with the public policy requiring full disclosure, the privilege is narrowly
11 construed. *Dike v. Dike*, 75 Wn. 2d 1, 11 (1968). Use of the privilege to prohibit the
12 introduction of evidence "must be balanced against the benefits to the administration of justice
13 stemming from the general duty to 'give what testimony one is capable of giving.' " *Dietz v.*
14 *Doe*, 131 Wn. 2d 835, 843 (1997) (quoting *United States v. Bryan*, 339 U.S. 323, 331, 70 S.
15 Ct. 724, 730 (1950)). The party asserting privilege has the burden of proving the existence of
16 the attorney-client relationship and that the information sought is within the privilege. *Dietz*
17 at 844.

18 B. Documents produced in the regular course of business are not work product.

19 Work product by a lawyer or non-lawyer is protected from discovery as long as it is
20 produced in anticipation of litigation, unless the requesting party can demonstrate a substantial
21 need for it. CR 26(b)(4); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396 (1985). The doctrine
22 of work product does not apply to "documents prepared in the regular course of business, as
23 opposed to documents prepared in anticipation of litigation." *Escalante v. Sentry Ins. Co.*, 49
24 Wn. App. 375, 395 (Div. 1, 1987, pet. denied). Premera suggests that because Premera's
25 conversion is an "exceptional event in the life of the company," the test is satisfied -- the
26 materials must not have been produced in the regular course of business. See Premera's

1 Briefing on Privilege Issues for the Special Master 14. This is not the test. The adjudicator is
2 to “look to the specific parties involved and the expectations of those parties” in order to
3 determine whether the materials were prepared in anticipation of litigation. *Heidebrink* at
4 400; *Escalante* at 396. Were the documents in question prepared in a manner that was usual
5 for Premera in making business decisions regarding strategic matters? It is likely that in
6 formulating business strategy, Premera’s management would have analyzed the potential
7 consequences of identified alternatives in the same or similar manner as in preparing for
8 initiation of this process. That is, management would have appointed a steering committee and
9 other committees to evaluate the proposal, retained consultants, and, upon completion of the
10 evaluation, submitted a recommendation to the board of directors for its determination. Where
11 a document would have been created even if there were no pending or anticipated litigation,
12 the protections of CR 26(b)(4) do not apply. *In re Bank One Securities Litigation*, 209 F.R.D.
13 418, 425 (N.D. Ill. 2002); *Griffith v. Davis*, 161 F.R.D. 687, 698-699 (C.D. Cal. 1995); *In re*
14 *Air Crash Disaster at Sioux City*, 133 F.R.D. 515, 520 (N.D. Ill. 1990); *Crowe v. Lederle*
15 *Laboratories*, 125 A.D.2d 875, 876, 510 N.Y.S.2d 228 (App. Div. 1986).

16 C. Work product should be produced since the OIC Staff has demonstrated a substantial
17 need for its production.

18 Even if work product by a lawyer or non-lawyer were prepared in anticipation of
19 litigation, it may be produced if the requesting party shows a substantial need for its
20 production. *Heidebrink* at 396. The OIC Staff’s substantial need for the withheld documents
21 and the integral part they play in this proceeding are addressed in the consultants’ letters and
22 memoranda submitted to the Special Master on June 30, 2003. The most compelling case for
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1 production is where the party from which discovery is sought has exclusive control of
2 information vital to the seeking party. *Pappas* at 210; *Heidebrink* at 401. This is the case
3 here.

4 DATED this _____ day of August, 2003.

5 Respectfully submitted,

6 OFFICE OF INSURANCE COMMISSIONER
7 STATE OF WASHINGTON

8
9 By: _____
10 John F. Hamje
11 Staff Attorney WSBA #32400
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14 360-725-7046
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16 ON BEHALF OF THE OIC STAFF

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CERTIFICATE OF SERVICE

16 Pursuant to WAC 10-08-110(3), I certify under penalty of perjury under the laws of the
17 State of Washington that this instrument was served upon all parties of record in this
18 proceeding by transmitting a copy thereof by FAX, and, on the same day, mailing a copy
19 thereof, properly addressed with postage prepaid, to the attorney for each party to the
20 proceeding.

21
22 Dated: _____, 2003
23 At Tumwater, Washington

John F. Hamje